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Shining the Spotlight on Johns: Moving Toward Equal Treatment of Male Customers and Female Prostitutes

*Julie Lefler**

INTRODUCTION

We have many names for women who engage in prostitution. We call them whores. We call them sluts. We think of them as disposable trash, responsible for many of the ills in our society. These names invite us to single out these individuals for ridicule and scorn. But what about the men who patronize these women? We call them johns, a name suggesting faceless men covered by a cloak of anonymity. This anonymous treatment runs within the justice system as well, since many of these men never see the inside of a jail, much less a courtroom.

Prostitution is a crime necessarily involving at least two people; yet only one is readily prosecuted in the justice system. While the female prostitute is vilified, her clients are seen as men who simply make mistakes, if they are seen at all. She is thrown into jail or forced back out onto the streets to earn the fine imposed upon her, while the john returns to his normal life, unscathed by the legal system.

This Note examines the different ways in which the American justice system treats female prostitutes and their male customers. It begins by discussing the historical views that have led to today's differential treatment. It then explores statutory inequity and the vast problem of disparate treatment in law enforcement and in the courtroom. Underscored is the unwillingness of courts to remedy this problem on equal protection grounds. Finally, it discusses current measures taken by legislatures and local communities to move toward equality by exposing previously faceless johns.

In discussing differential treatment, this Note does not support the criminalization of prostitution, nor does it propose legalization or

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decriminalization. Rather, this note advocates even-handed treatment of prostitution and patronization as long as they are both punishable offenses within the justice system.¹ There is a strong movement today toward legalization and/or decriminalization by such groups such as COYOTE (Call Off Your Old Tired Ethics).² Without invalidating their beliefs, such views have yet to erase prostitution laws from the books. Since only one state has legalized prostitution,³ and since the moral viewpoints of the American majority make it unlikely that other states will follow suit in the immediate future, this Note examines the current problem with criminalization as the norm.

I. AN HISTORICAL OVERVIEW OF THE TREATMENT OF PROSTITUTES AND JOHNS

As a general rule, one can learn much about a society's present condition by examining its past. This is certainly true with regard to prostitution in America. Much of the differential treatment of prostitutes and johns in the United States today can be traced to the sexual double standard present throughout this country's history. America's past is fraught with sympathy and excuses for the sexual appetites of men, yet condemnation of women for essentially the same behavior.⁴

This inequitable treatment was not an issue at this country's inception, since devout religious faith and the necessity of strong family units obviated the need or desire for women to service the sexual wants of men for money.⁵ Women did not have any reason to engage in prostitution while there was plenty of opportunity to marry and raise a family.⁶ This societal structure provided stability for women that was not conducive to prostitution. However, as the country became increasingly industrialized,

1. Obviously legalization or decriminalization would obviate the need for a discussion of differential treatment since neither male patrons nor female prostitutes would be within the grasp of the justice system.

2. See Margaret A. Baldwin, *Split at the Root: Prostitution and Feminist Discourses of Law Reform*, 5 YALE J.L. & FEMINISM 47, 95-96 (1992). COYOTE members argue that for some women prostitution is the ultimate expression of female sexual freedom. See *id.* Similar groups argue that some women feel sexual empowerment only within the confines of a prostitute-john relationship. See *id.*

3. Nevada is the only state that currently allows legalized prostitution. But even Nevada has not been willing to fully endorse legalization. Prostitution is only legal in twelve counties. In addition, there are various restrictions on the prostitutes' activities. Prostitutes must work within a brothel, undergo AIDS testing, and be subjected to drug screening to continue their work legally. See Evelina Giobbe & Sue Gibel, *Impressions of a Public Policy Initiative*, 16 HAMLINE J. PUB. L. & POL'Y 1, 20-21 (1994). See also Minouche Kandel, *Whores in Court: Judicial Processing of Prostitutes in the Boston Municipal Court in 1990*, 4 YALE J.L. & FEMINISM 329, 331 (1992).

4. See ROSEMARIE TONG, WOMEN, SEX, AND THE LAW 39 (1984).

5. See RUTH ROSEN, THE LOST SISTERHOOD, PROSTITUTION IN AMERICA, 1900-1918, at 1 (1982).

6. *Id.*

many women were pushed out of legitimate occupations and some began to sell their sexual services for money.⁷

The justice system's response to this sudden influx of prostitutes was first manifested in essentially a hands-off policy. Although prostitutes were condemned socially as sexual and moral deviants and treated as outcasts from legitimate society, the law did not respond as harshly.⁸ In fact, during most of the Nineteenth century prostitution was not even a separate crime.⁹ Rather, the courts dealt with prostitutes through the use of public nuisance laws.¹⁰ Prosecutors charged them with offenses such as vagrancy or lewdness.¹¹

Even with legal options available to punish prostitutes, the justice system still did not take an active role to suppress prostitution.¹² When police did arrest them, prostitutes were fined and rarely saw the inside of a jail.¹³ However, this may have been motivated more by concern for men and the familial structure than by temperance and mercy toward women. Rosemarie Tong suggests that "the law's desire to punish bad girls has often been moderated by its wish to save nice boys from harm, inconvenience, or embarrassment."¹⁴

The justice system eventually resolved the dilemma of punishing wayward women while preserving the reputation of men in the late Nineteenth century when law enforcement sat up and took notice of prostitutes.¹⁵ The reaction was swift and harsh as the law no longer viewed prostitution leniently, and accordingly put separate criminal penalties in place.¹⁶ There were even special "morals" courts created to handle prostitution cases.¹⁷ However, the law went from underenforcement to indiscriminate enforcement since police arrested many women simply for being on the street at night.¹⁸ Unjust treatment continued inside the courtroom as judges based sentencing mainly on the sexual history of the

7. See *id.* at 3.

8. See *id.* at 4.

9. See BARBARA MEIL HOBSON, *UNEASY VIRTUE: THE POLITICS OF PROSTITUTION AND THE AMERICAN REFORM TRADITION* 32-33 (rev. ed. 1990).

10. See *id.*

11. See ROSEN, *supra* note 5, at 4. These laws generally did not have equal applicability to male customers. See, e.g., *People v. Anonymous*, 292 N.Y.S. 282 (1936) (interpreting vagrancy statute to only apply to prostitutes and those who aided and abetted prostitutes. The court did point out gender inequity in statute, but chose to interpret aiding and abetting narrowly, excluding its applicability to male customers).

12. See Ann M. Lucas, *Race, Class, Gender, and Deviancy: The Criminalization of Prostitution*, 10 *BERKELEY WOMEN'S L.J.* 47, 51 (1995).

13. See ROSEN, *supra* note 5, at 5.

14. TONG, *supra* note 4, at 39.

15. See Lucas, *supra* note 12, at 51.

16. See *id.*; Kandel, *supra* note 3, at 341.

17. See ROSEN, *supra* note 5, at 19.

18. See Kandel, *supra* note 3, at 342.

defendant, rather than on the crime before the court.¹⁹

In contrast to the treatment of female prostitutes, law enforcement and the court system stood by their paternalistic attitudes when it came to punishing men. Consequently, the justice system's new reaction to prostitution was not even-handed. While women were being hauled before courts to answer charges of prostitution, their male clients were not to be found within courtroom doors.²⁰ Police did not pick men up for standing on street corners nor did prosecutors grill them about their sexual histories.²¹ Incredibly, procuring prostitutes was not even punishable as a criminal offense.²² Thus, men satisfied their sexual desires with no consequences while women alone paid the price.

Differential enforcement was present in other areas as well, such as in the treatment of sexually transmitted diseases. When such diseases prevailed, female prostitutes, and not their male customers, were tested and blamed for these outbreaks.²³ Many states passed laws mandating testing for arrested prostitutes.²⁴ Those who tested positive could be detained until cured.²⁵ Not only was the testing and detaining process discriminatory, but it also prevented effective efforts to stop the spread of such diseases.²⁶ Society vilified prostitutes and saw them as carriers of these diseases.²⁷ Yet society overlooked the men—who brought these diseases home to their wives—who were just as responsible, if not more so, than the prostitutes.²⁸

There are several explanations for why the justice system treated prostitutes and customers unequally. Law enforcement's reaction was largely due to the widely held belief that sexual deviance signalled unlimited female criminal potential.²⁹ While males were viewed as reformable even though they committed an immoral sexual act, women went on a downward spiral that led to a life of crime.³⁰ Therefore, prostitutes may have been judged more harshly because they were considered lost causes, incapable of redemption. The only course of action was to segregate them from society so they could not corrupt virtuous women.

In addition, the Victorian myth that men could not control their sex

19. *See id.* at 341.

20. *See id.*

21. *See id.*

22. *See id.*

23. *See Lucas, supra* note 12, at 59; Kandel, *supra* note 3, at 342; ROSEN, *supra* note 5, at 35.

24. For example, in 1910 New York passed the Page Law requiring mandatory testing for venereal diseases for all arrested prostitutes. *See Lucas, supra* note 12, at 60.

25. *See ROSEN, supra* note 5, at 35.

26. *See Kandel, supra* note 3, at 342.

27. *See Lucas, supra* note 12, at 55.

28. *See id.*

29. *See id.* at 51.

30. *See id.*

drives, while female sexuality was nonexistent,³¹ continued and persists today, affecting the way the justice system differentiates prostitutes and johns.³² Prostitutes were considered by some as a necessary evil, keeping male urges in check and preventing men from bothering other "respectable" women like their wives.³³ In fact, many believed that

[v]ice is one of the weaknesses of men; it cannot be extirpated; if repressed unduly at one point, it will break out more violently and bafflingly elsewhere; a segregated district is really a protection to the morality of the womanhood of the city, for without it rape would be common and clandestine immorality would increase.³⁴

Therefore, men were not faulted for acting upon their irrepressible desires. This may help explain the justice system's hesitancy to punish them. In contrast, women were acting against their nature by acting sexually and society sought to separate them from respectable women.³⁵ Thus, legislatures enacted laws "to control female sexuality and promiscuity, even though prostitution is considered a 'necessary evil' which must exist, albeit clandestinely, to serve the sexual freedom of men."³⁶

Another reason for the vilification of prostitutes was the threat they posed to the existing patriarchal familial structure which guarded male dominance.³⁷ Prostitutes asserted independence by not relying on married life as their sole source of support and by making more money than could be had in legitimate occupations.³⁸ Thus,

the nineteenth-century campaign to criminalize prostitution was part of a sometimes desperate attempt to enforce norms of marriage, chastity, and propriety on women—to keep women in the private sphere of home and family, to prevent them from supporting themselves independently of men, to encourage them to marry.³⁹

The justice system condemned and punished harshly those who sought to exist outside the patriarchal system through prostitution.

However, not everyone condoned this vilification of the prostitute. While most blamed the plague of prostitution on women, some segments of

31. See ROSEN, *supra* note 5, at 5.

32. See *id.* at 56.

33. See *id.*

34. *Id.*

35. See Carol H. Hauge, *Prostitution of Women and International Human Rights Law: Transforming Exploitation into Equality*, 8 N.Y. INT'L L. REV. 23, 41 (1995).

36. *Id.*

37. See Lucas, *supra* note 12, at 59.

38. See *id.*

39. *Id.* at 50.

society argued for a more egalitarian view. Many women's groups placed equal blame on men for causing women to enter the sinful occupation.⁴⁰ These early reformers recognized the double standard present in issues of sexuality and held men just as accountable as women.⁴¹ The beliefs of these progressive women can be seen in the attitudes of many modern feminists; however, as will be demonstrated below, the justice system has not openly embraced their view of equality.

II. THE CURRENT PROBLEM

While women in general have made great strides toward equality in American society, the prostitute remains subjected to antiquated norms. Prostitutes and johns have yet to receive the same treatment under the law. All too often prostitutes serve jail time or pay fines while their customers continually escape without recourse.⁴²

To bring about equality, two major changes must take place within the justice system. The first is that statutes must punish both the john and the prostitute. Law enforcement cannot penalize johns unless their conduct constitutes a criminal act. Contrary to laws in place in the late Nineteenth and early Twentieth century,⁴³ modern statutes have largely achieved this goal.⁴⁴

However, having laws available to punish both prostitutes and johns only solves part of the problem. These laws must be enforced in an equal manner or discriminatory practices will continue to dominate. Laws on the books are ineffectual if police officers are unwilling to arrest johns, and courts do not process them in the same way as prostitutes. Therefore, the area of enforcement represents today's real battleground.

A. EQUALITY UNDER THE LAW

Before discussing problems with discriminatory enforcement, it is important to examine modern statutes. Most states did not even consider the patronization of a prostitute to be a crime until well into this century.⁴⁵ Many states have rectified the situation, but not all have done so.⁴⁶ There

40. See ROSEN, *supra* note 5, at 8.

41. See *id.*

42. See Alexandra Bongard Stremler, *Sex for Money and the Morning After: Listening to Women and the Feminist Voice in Prostitution Discourse*, 7 U. FLA. J.L. & PUB. POL'Y 189, 194 (1995).

43. See ROSEN, *supra* note 5, at 4.

44. See, e.g., MASS. GEN. LAWS ANN. ch. 272, § 53A (West Supp. 1997).

45. See, e.g., KAN. CRIM. CODE ANN. § 21-3515 (West Supp. 1997) (not enacted until 1969).

46. See Stremler, *supra* note 42, at 194. See also CONN. GEN. STAT. ANN. § 53a-83 (West Supp. 1997); HAW. REV. STAT. ANN. § 712-1200 (West 1986); IDAHO CODE § 18-5614 (West Supp. 1997); IND. CODE ANN. § 35-45-4-3 (West Supp. 1997); MASS. GEN. LAWS ANN. ch. 272, § 53A (West Supp. 1997); TEX. PENAL CODE ANN. § 43.02 (West

are three main types of prostitution statutes: those which punish the prostitute but not the customer, those that punish both but proscribe stricter penalties for the prostitute, and those that criminalize the behaviors of prostitutes and johns equally.

Although not the majority, some states preserve America's historical inequitable treatment of prostitutes and johns.⁴⁷ Unfortunately, others go beyond a mere absence of sanctions for johns by enacting further discriminatory laws. For example, Kentucky law not only specifically states that a man cannot be convicted of prostitution, and does not provide penalties for patronizing a prostitute, but it has a statute requiring convicted prostitutes to undergo AIDS testing without mandating the same for patrons.⁴⁸ This parallels the historical treatment of other venereal diseases⁴⁹ and is likely to have the same result of only taking care of one side of the problem.

Other states are more fair since they punish the male patron, but are still unequal in that the punishments for patrons are less harsh than those for prostitutes. The Model Penal Code exemplifies this approach.⁵⁰ The Model Penal Code classifies prostitution as a petty misdemeanor.⁵¹ However, patronizing a prostitute is merely an infraction.⁵² Subsequently, a patron can never be imprisoned for his offense, at most subject only to fines.⁵³

The American Law Institute's explanation for this difference in treatment is that the law punishes individuals based upon their degree of involvement in the commercial venture of prostitution.⁵⁴ The implicit message is that since prostitutes receive money, their involvement is

1994).

47. See also ALA. CODE § 13A-12 Commentary (1994). Alabama law is unique because prostitutes are generally dealt with under nuisance law. The Comments to the Criminal Code on pimping reveal that the legislature considered an amendment which would have criminalized patronizing a prostitute; this section proved too controversial and did not pass.; ALASKA STAT. §§ 11.66.100, 11.66.110, 11.66.120, 11.66.130, 11.66.140 (Michie 1996) (customer does not fit within any of these definitions).

48. See KY. REV. STAT. ANN. §§ 529.020 & 529.090 (Michie 1990). See also LA. REV. STAT. ANN. § 82 (West Supp. 1998).

49. See Lucas, *supra* note 12, at 59; Kandel, *supra* note 3, at 342; ROSEN, *supra* note 5, at 35.

50. MODEL PENAL CODE § 251.2 (1980).

51. Under this section a person is guilty of prostitution if "he or she is an inmate of a house of prostitution or otherwise engages in sexual activity as a business; or loiters in or within view of any public place for the purpose of being hired to engage in sexual activity." *Id.*

52. A person is guilty under this section if "he hires a prostitute to engage in sexual activity with him, or if he enters or remains in a house of prostitution for the purpose of engaging in sexual activity." *Id.* (note that this statute can only be violated by a man).

53. See *id.*, cmt. 6.

54. See *id.*, cmt. 2, cmt 6. One positive aspect about the American Legal Institute's view on this matter is that it heavily targets madams and pimps for their central role in prostitution. These individuals can even be charged with a felony. See *id.*

greater and thus the law should punish them more harshly. Furthermore, the drafters claim that harsher penalties for procurers are unrealistic since prosecutors, judges and juries would disregard such laws due to "the common perception of extra-marital intercourse as a widespread practice."⁵⁵ Thus it appears to say that legislatures should bow to public views of men's sexual appetites and disregard the fact that such views are unequal. Thus, the historical double standard continues.

Unfortunately, many states have followed the Model Penal Code's lead. For example, Colorado law provides that prostitution is a Class 3 misdemeanor while patronizing a prostitute is a mere Class 1 petty offense.⁵⁶ One positive aspect of the Colorado law is that it mandates testing for both prostitutes and patrons.⁵⁷ However, the statute offers differing sanctions for prostitutes and patrons who knowingly engage in prostitution activities while they are infected with HIV or AIDS. Prosecutors can charge prostitutes with a Class 5 felony, but can only charge patrons with a Class 6 felony.⁵⁸ This is another example of valuing the "decent" patron's life as greater than the life of a prostitute.

Additionally, some states punished unequally on first offenses, but then punished equally on subsequent offenses. For example, the Illinois Criminal Code initially classified prostitution as a Class A misdemeanor and patronizing as a Class B misdemeanor.⁵⁹ But the law treated both charges as Class 4 felonies upon the third conviction.⁶⁰ This distinction made little sense because by eventually punishing the crime the same way, the legislature recognized the fact that the crimes are equal. Acknowledging this imbalance, the Illinois Legislature amended the statute in 1994 to classify both first offenses as Class A misdemeanors.⁶¹

Finally, many states now treat prostitutes and johns with full equality. They proscribe the same penalties for johns and prostitutes. The Massachusetts statute is one example of a completely gender-neutral law.⁶²

55. *Id.*, cmt. 6.

56. *See* COLO. REV. STAT. ANN. §§ 18-7-201 & 18-7-205 (West 1990). *See also* ALA. CODE §§ 5-70-102 & 5-70-103 (1993) (prostitution classified as a Class B misdemeanor for first offense and a Class A misdemeanor for each subsequent offense while patronizing a prostitute always classified as a Class C misdemeanor); KAN. CRIM. CODE ANN. §§ 21-3512 and 21-3515 (West Supp. 1997) (engaging in prostitution a Class B misdemeanor but patronizing a prostitute a Class C misdemeanor).

57. *See* COLO. REV. STAT. ANN. §§ 18-7-201.5 & 18-7-205.5 (West Supp. 1997).

58. *See id.*

59. *See* 720 ILL. COMP. STAT. ANN. §§ 5/11-14 & 5/11-18 (West 1993).

60. *See id.*

61. *See* 720 ILL. COMP. STAT. ANN. § 5/11-18 (West Supp. 1997).

62. *See* MASS. GEN. LAWS ANN. ch. 272, § 53A (West Supp. 1997). The statute in its entirety reads:

Engaging in sexual conduct for a fee; penalty: Any person who engages, agrees to engage, or offers to engage in sexual conduct with another person in return for a fee, or any person who pays, agrees to pay or offers to pay another person to engage in sexual conduct, or to agree to engage in sexual conduct with another natural person

Other states that criminalize prostitution should use this statute as a model since it is clear, concise, and leaves no doubt as to the characterization of the offense. In contrast, California, while providing equality, hides its provisions under the general heading of "Disorderly Conduct" and it is thereby difficult to understand exactly what is being prohibited.⁶³ These vague provisions should be re-written since clarity in the law is an important step to ensure equitable enforcement of those laws.

B. EQUALITY IN ENFORCEMENT

Even though most statutes are now gender neutral or at least provide some punishment for johns, the historical double standard continues to persist in the discriminatory enforcement of these laws. Women continue to be arrested more often, and prosecuted and sentenced more harshly than their male customers.⁶⁴ For example, most states traditionally incarcerate or fine prostitutes while merely issuing a citation to her customers.⁶⁵

Because police officers have wide discretion in law enforcement, they are the main source behind gender-based discrimination.⁶⁶ When faced with someone who has potentially committed a crime, an officer can detain them, arrest them or let them go. Understandably, a police officer's views about race, ethnicity and gender will affect their actions.

Statistical evidence provides convincing proof that discriminatory treatment does indeed happen at the law enforcement level. According to the FBI's Uniform Crime Reports, in 1993 only 35.7% of prostitution arrests nationwide were males while 64.3% of arrests were females.⁶⁷ Evidently, arrests for males are increasing since in 1970 only 20.7% of

may be punished by imprisonment in a jail or house of correction for not more than one year, or by a fine of not more than five hundred dollars, or by both such fine and imprisonment.

Id. See also CONN. GEN. STAT. ANN. §§ 53a-82 & 53a-83 (West Supp. 1997) (both offenses classified as a Class A misdemeanors); HAW. REV. STAT. ANN. § 712-1200 (West 1986) (though statute appears to apply only to prostitutes, supplemental commentary clarifies that legislature intended it to apply to customers as well); IDAHO CODE §§ 18-5613 & 18-5614 (West Supp. 1997) (both offenses are misdemeanors and escalate to felonies upon the third conviction); IND. CODE §§ 35-45-4-2 & 35-45-4-3 (West Supp. 1997) (both offenses are initially Class A misdemeanors but can escalate to Class D felonies upon third conviction); TEX. PENAL CODE § 43.02 (West 1994).

63. See CAL. PENAL CODE § 647 (West Supp. 1998).

64. See Stremler, *supra* note 42, at 194.

65. See Courtney Guyton Persons, Note, *Sex in the Sunlight: The Effectiveness, Efficiency, Constitutionality, and Advisability of Publishing Names and Pictures of Prostitutes' Patrons*, 49 VAND. L. REV. 1525, 1531 (1996). See also *Sexism Purged from Sex Statute*, ALLENTOWN MORNING CALL, June 21, 1995, at B1.

66. See John H. Lindquist et al., *Judicial Processing of Males and Females Charged with Prostitution*, 17 J. CRIM. JUST. 277, 278 (1989). One judge even admitted to giving prostitutes twenty days in jail while only requiring johns to be fined and ordered to clean up trash on the streets. See *Arrested "Johns" Ordered to Clean up Street*, S.F. CHRON., Nov. 16, 1992, at D6.

67. DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 1994, UNIFORM CRIME REPORTS, 283 (1994).

arrestees were men.⁶⁸ But this change is not very significant since it constitutes only a 15% increase in thirteen years.

A more localized 1974 study of arrests California shows that of the 768 total arrests for prostitution, 756 of such arrestees were women.⁶⁹ Similarly, in the same year in Oakland, 3,663 female prostitutes were arrested but only 21 johns were arrested.⁷⁰ Although these statistics are over twenty years old, they unfortunately reflect current trends.

A recent Boston study illustrates that this trend has continued as the justice system continues to treat men and women differently.⁷¹ First, it was not until 1983 that the legislature amended the applicable Massachusetts statute to include the activities of male customers.⁷² But the long overdue amendment clearly had little impact. The study shows that in 1990, 263 women were arraigned in Boston on charges of prostitution.⁷³ Incredibly, even though laws applied equally to prostitutes and patrons, there was not one customer arraigned in the Boston courts that year.⁷⁴ Additionally, while 27 women were sentenced to jail time, no man suffered such punishment.⁷⁵

The study also indicates that the differential treatment was most likely related to gender rather than to the fact that prostitution and patronizing prostitutes are different offenses.⁷⁶ For example, judges dismissed 43% of cases involving male prostitutes, but this only occurred in 19% of instances for female prostitutes.⁷⁷ While this could be due to a variety of unknown factors, the differential appears to be too great to be unrelated to gender.

The Boston study proffers one insightful explanation: the police arrest most female prostitutes through the use of male decoys who pose as potential customers, not vice-versa, thus there are no customers to arrest.⁷⁸ The study notes that the Boston police do sometimes conduct such sweeps aimed at men, yet they do not result in punishment within the criminal justice system.⁷⁹

Recognizing that these decoy problems are discriminatory in practice, some prostitutes have sought to bring this issue out in the courtroom. However, the law's response has not been favorable.⁸⁰ For example, the

68. *See id.* Note that this percentage includes both patrons and pimps.

69. TONG, *supra* note 4, at 55. *See also* J.L. Pimsleur, *Hookers, "Johns"/New S.F. Crackdown on Vice*, S.F. CHRON., Feb. 4, 1987, at A4 (stating that San Francisco Police Department makes around 4,000 arrests for prostitution per year, but only about five percent are customers).

70. *See id.*

71. *See* Kandel, *supra* note 3, at 332.

72. *See id.* at 335.

73. *See id.* at 332.

74. *See id.* at 335.

75. *See id.*

76. *See id.* at 332.

77. *See id.*

78. *See id.* at 334.

79. *See id.* at 335-36.

80. *See* *People v. Superior Court*, 19 Cal. 3d 338 (1977).

California Supreme Court rejected a challenge to prostitution on equal protection grounds, since the statute applied equally on its face and there was not enough evidence to suggest discriminatory enforcement.⁸¹ One defendant's leading arguments pointed out that the Oakland police department used more decoys to trap women than men.⁸² They presented evidence that in 1973 and 1974 only 57 men were arrested through the use of decoys, while the police arrested 1,160 women through this method.⁸³

The court rationalized these numbers through the department policy to go after the "profiteer" in commercial crimes.⁸⁴ The court analogized prostitution to illegal drug trafficking where it is valid policy to go after the supplier rather than the user.⁸⁵ But this reasoning is flawed for several reasons. First, it is questionable whether the two businesses are analogous. Given historical stereotypes that lead to differential treatment, it is more likely that unequal enforcement of prostitution laws is guided by prejudice than with narcotics enforcement. Furthermore, drug pushers are providing a potentially deadly product. It is therefore imperative that they be dealt with harshly. The drug user can be seen as a victim of addiction and thus in need of the state's protection. The same is not true of prostitution where the product itself is not harmful and the johns are not vulnerable victims.

By far the most outrageous claim in the California Supreme Court's opinion was that police apprehend the "profiteer" by going after prostitutes. In most circumstances it is hardly reasonable to say that the prostitute is the profiteer. If one follows this logic, law enforcement should target pimps foremost since they are the ones who exploit women for profit. And yet, as the Boston study shows, very few men, including pimps, ever enter the justice system to answer for prostitution-related charges.⁸⁶

However, there are developments along the judicial horizon as some judges have taken an affirmative stance against discriminatory enforcement. For example, one judge instituted a policy whereby she refused to hear cases involving prostitutes unless the police arrested the customer of the prostitute as well.⁸⁷ This policy is a step in the right direction and all state legislatures should amend their criminal codes to make this practice mandatory. However, this would still not solve the problem entirely; biased decoy methods sanctioned by the courts will continue to throw more prostitutes than customers into the legal arena.

Women are not only punished by the courts. For example, pimps and tricks subject prostitutes to violent crimes of rape, beatings and robberies.

81. *See id.* at 347.

82. *See id.* at 349.

83. *See id.*

84. *See id.*

85. *See id.* at 350.

86. *See Kandel, supra* note 3, at 332.

87. *See id.* at 340.

These women may even fall victim to these crimes at the hands of those sworn to protect them.⁸⁸ Their status and station in life makes it difficult for them to have the wrongs perpetrated against them vindicated in a court of law since they fear reprisals.⁸⁹ Some police threaten to arrest women who refuse them free sexual services; even some judges and lawyers hypocritically engage the services of prostitutes.⁹⁰

While women are repeatedly targeted for scorn and abuse, men go about their business in a cloak of silence. Margaret A. Baldwin describes johns as "fleeting, ghostly figures," and states that very few studies have been done with regard to their role in the prostitution system.⁹¹ This may be due to the fact that they are "mostly white, married men with at least a little disposable income. Real people, that is."⁹² She goes on to describe how police agencies are extremely reluctant to expose johns to the embarrassment of arrest or other punitive measures.⁹³

This differential treatment has much to do with the varying ways that society at large views prostitutes and johns. As was true historically in America, the prevailing opinion today is that prostitutes are the expendable waste of society.⁹⁴ People generally believe that prostitutes will not be missed when in jail, except, perhaps by their pimps.⁹⁵ On the other hand, "[t]o imprison, or otherwise stigmatize, the average male patron . . . usually involves disrupting a man's 'respectable' employment, standing in the community, and even his marriage."⁹⁶ Thus, people do not see men who seek the services of prostitutes as expendable, but rather as providers for their families. As Americans, we profess a great deal of respect for the family unit and are therefore unwilling to disrupt it by incarcerating "respectable" men. But even if this characterization is true, criminal law was never meant to be discriminatorily based upon one's station in life.

III. CONSTITUTIONAL ISSUES

Appellate courts have become the battlegrounds for challenging inequities in statutes and enforcement of prostitution laws. Many prostitutes have challenged their convictions on equal protection grounds. However, these constitutional attacks have been largely unsuccessful.

88. See Baldwin, *supra* note 2, at 64-65. See also Hauge, *supra* note 35, at 31 (forcing prostitution underground allows pimps and johns to commit crimes without reprisal while women find no recourse within the justice system).

89. See Hauge, *supra* note 35, at 30; Kandel, *supra* note 3, at 346.

90. See Kandel, *supra* note 3, at 346.

91. Margaret A. Baldwin, *Strategies of Connection: Prostitution and Feminist Politics*, 1 MICH. J. GENDER & L. 65, 75 (1993).

92. See *id.* at 74.

93. *Id.* at 75.

94. See Stremmler, *supra* note 42, at 194.

95. See *id.*

96. *Id.*

Since most prostitution statutes are now gender neutral, the challenges generally relate to inequitable enforcement. Unfortunately, the standards the courts use to determine discrimination tend to be very high. For example, one court stated that to meet her burden, the defendant had to show "a pattern of discriminatory enforcement against women so overwhelming that intent to discriminate can be inferred."⁹⁷ This is not an easy standard to meet.

Another court adopted a very strict approach, setting a defendant's burden so high that it was nearly impossible to satisfy.⁹⁸ The court stated that in the case before it, there was no hard evidence of discriminatory enforcement and refused to base a decision on what it called "mere conjecture."⁹⁹ The "conjecture" the court referred to was officer testimony stating that it was department policy not to arrest johns.¹⁰⁰ The court discounted this testimony by pointing to other laws available to punish male customers and stating that the defendant could not prove that men were not being charged with these offenses.¹⁰¹ But the question of whether the laws to punish men were in place entirely missed the point, as the issue was whether these laws were being enforced. It seems clear that the officer who testified provided convincing evidence that the police deliberately did not arrest johns. It is hard to imagine what better evidence of an intention to discriminate a defendant could show.

Some courts have promulgated even higher standards. In the case of *In re Dora P.*,¹⁰² the court required the defendant to show "that the law is enforced consciously and deliberately against some and that, with knowledge that the crime has been committed by others, there is an intentional and premeditated abstention from enforcing it against others."¹⁰³ The court refused to dismiss charges of prostitution on equal protection grounds since the defendant had not met this burden.¹⁰⁴ It ignored evidence of discriminatory enforcement statistics by ruling that the legislature deemed the crimes of patronizing and prostitution as separate, and the defendant could not lump them together to make her position more favorable.¹⁰⁵ But this skirts the issue because, even if the crimes are separate, the defendant presented statistical evidence that showed discriminatory differences in the prosecution of each gender. If prostitutes

97. *State v. Tookes*, 67 Haw. 608, 614 (1985).

98. *See Commonwealth v. King*, 374 Mass. 5, 17 (1977).

99. *See id. Accord Yakima v. Johnson*, 16 Wash. App. 143 (1976).

100. *See King*, 374 Mass. at 18.

101. *See id. See also In Re Elizabeth G.*, 53 Cal. App. 3d 725, 729 (1975) (testimony that only 4.5% of arrests for prostitution-related offenses were of men in 1973, only 1.8% in 1974 and only 27.3% in 1975 was not sufficient to show discriminatory enforcement by Stockton Police Department).

102. 418 N.Y.S.2d 597 (1979).

103. *Id.* at 605.

104. *See id.*

105. *See id.* at 604.

cannot demonstrate discrimination through statistical evidence, there seems to be no other way to ever meet the high burden established by the court.

Under similar principles, other courts have even upheld laws that were gender biased on their face. In *State v. Devall*,¹⁰⁶ the court dealt with a statute that defined prostitution as "the practice by a *female* of indiscriminate sexual intercourse with *males* for compensation."¹⁰⁷ The court declined to declare this statute unconstitutional on equal protection grounds because there was no evidence to suggest that male prostitution was prevalent and thus the legislature did not have to act against it.¹⁰⁸ Therefore, it seems that the legislature has the power to define what the problem is and how to take care of it. It also appears that there is little recourse when their solutions have the effect of singling one gender out for persecution.

Additionally, even if a defendant shows a pattern of discriminatory enforcement, courts have ruled that a gender biased law may still be constitutional if the classification serves "important government objectives" and is "related to achieving those objectives."¹⁰⁹ Courts have used the "important governmental objective" standard to avoid declaring prostitution laws unconstitutional on equal protection grounds.

Many courts consider the targeting of sellers, rather than buyers, of an illicit trade or good to constitute an "important governmental objective."¹¹⁰ In *King*, a defendant unsuccessfully challenged a discriminatorily enforced prostitution law.¹¹¹ The court first held that since the law applied equally to male and female prostitutes it was presumptively constitutional.¹¹² As for the punishment of johns, the court found it acceptable for the legislature to attack one side of the problem and analogized prostitution to laws that punish sellers of pornography but not their customers.¹¹³ But pornography does not present an equal protection issue since customers can be male or female. It may be a legislature's prerogative to attack only one side of a problem—but not when the attack is based upon gender. Moreover, if law enforcement was really targeting profiteers in the prostitution business, it should be targeting pimps rather than prostitutes.¹¹⁴

106. 302 So. 2d 909 (La. 1974).

107. *Id.* at 910 (emphasis added).

108. *See id.* at 912.

109. *Tookes*, 67 Haw. at 614.

110. *See id.*

111. 374 Mass. at 5.

112. *See id.* at 15.

113. *See id.* at 16.

114. Pimps have historically not been targeted. *See, e.g.,* *People v. Draper*, 154 N.Y.S. 1034 (1915). The court dismissed charges against an accused pimp essentially because his operation was not large enough. *See id.* at 1038. The court stated that

it must be entirely obvious that the purpose of the Legislature was not to place in the hands of two or more prostitutes, voluntarily accompanying one or more men upon a night's debauch, the power to blackmail these erring

Some courts have actually struck down prostitution laws and reversed convictions on equal protection grounds. In *Commonwealth v. An Unnamed Defendant*, charges were dismissed against a prostitute because she successfully demonstrated that it was police department policy to enforce the laws in a discriminatory manner.¹¹⁵ The court applied a three-prong test, requiring the defendant to demonstrate "that a broader class of persons than those prosecuted has violated the law . . . that failure to prosecute was either consistent or deliberate . . . and that the decision not to prosecute was based on an impermissible classification such as race, religion, or sex."¹¹⁶

The prostitute met this burden by introducing statistical evidence and police testimony. The record showed that during the period of June 6, 1984 through May 10, 1985, while the police arrested 163 women for prostitution-related offenses, they only arrested 5 men for the same crimes.¹¹⁷ A police officer testified that the discrepancy was not simply a failure to arrest the male customers, but that it was essentially departmental policy to not do so.¹¹⁸

In this case, the officer even caught the defendant performing oral sex on the customer, and yet the officer still did not arrest him.¹¹⁹ The officer's only explanation for the policy was that "complaints from area citizens related 'mainly to the girls,' and that the women arrested are known to the police, whereas the males are not 'familiar' to the police."¹²⁰ It seems odd that suddenly we have this new rule where an officer can choose not to arrest a suspect for a crime committed in plain view simply because that person is unknown to them. It is difficult to imagine the application of this theory to other crimes such as robbery or murder.

In a case entitled *In re P.*, a prostitute was arrested and charged with prostitution while the john was not charged.¹²¹ The court not only reversed the conviction but also struck down the statute under which she was charged on equal protection grounds.¹²² The court noted that prostitution was a misdemeanor with a penalty of up to ninety days in jail while patronizing a prostitute was merely a violation with a maximum penalty of

brothers, under threat of a term in state prison, but rather to reach and punish those conscienceless vampires who make merchandise of the passions of men.

Id. Ironically, the court had two classifications for pimps—"good" and "bad" pimps, while prostitutes were punished without regard to status. *See id.*

115. 22 Mass. App. Ct. 230, 231 (1986).

116. *Id.* at 235.

117. *See id.* at 231 n.3.

118. *See id.* at 232.

119. *See id.*

120. *Id.* at 233.

121. 400 N.Y.S.2d 455, 455 (1977).

122. *See id.* at 455.

fifteen days in jail or a \$250 fine.¹²³

The court further noted that in the first six months of 1977, while the police arrested 2,944 females under prostitution laws, they only arrested 275 men during the same period.¹²⁴ And of the 2,944 female prostitutes arrested, only 60 of their johns were charged.¹²⁵ The court said that this practice was largely a result of the fact that male officers were often decoys, while no female officers were used to trap johns.¹²⁶ In cases where the police used female decoys there was great public outcry because "respectable" married white men were caught.¹²⁷ Considering all of these factors the court concluded that

[t]he men create the market; and the women who supply the demand pay the penalty. It is time that this unfair discrimination and injustice should cease. . . . The practical application of the law as heretofore enforced is an unjust discrimination against women in the matter of an offense, which in its very nature, if completed, required the participation of men.¹²⁸

More courts need to keep this in mind and refrain from setting standards that are nearly impossible to attain.

IV. HOW THE JUSTICE SYSTEM IS DEALING WITH THE PROBLEM: PROGRAMS TARGETING JOHNS

In response to the inequities in the law regarding prostitution, the justice system has taken measures to change the situation. As previously discussed, most state governments have changed their criminal codes to include the activities of male customers.¹²⁹ But laws on the books are not sufficient if they are inconsistently enforced and if the punishments fail to

123. *See id.* at 460.

124. *See id.*

125. *See id.*

126. *See id.*

127. *See id.* at 460 n.9.

128. *Id.* at 461 (quoting *People v. Edwards*, 180 N.Y.S. 631, 634-35 (1920)). In the wake of *In re P.*, the New York legislature amended its statute to provide equal punishment for both prostitute and john. *See People v. James*, 514 N.Y.S.2d 342, 343 (1979). As an unintended consequence, this amendment harmed prostitutes. *See id.* Prior to this, the court had a policy of giving first time offender prostitutes a second chance by dismissing charges. *See id.* Since harsher penalties were imposed against johns they also had to be enforced against prostitutes due to equal protection issues, and the policy was abandoned. *See id.* This had a much greater impact on prostitutes since it forced many to return to the streets to earn their fines while their patrons generally had the economic ability absorb similar fines and forget that the incident ever occurred. *See id.*

129. *See Stremler, supra* note 42, at 194. *See also* CONN. GEN. STAT. ANN. § 53a-83 (West Supp. 1997); HAW. REV. STAT. ANN. § 712-1200 (West 1986); IDAHO CODE § 18-5614 (West Supp. 1997); IND. CODE ANN. § 35-45-4-3 (West Supp. 1997); MASS. GEN. LAWS ANN. ch. 272, § 53A (West Supp. 1997); TEX. PENAL CODE ANN. § 43.02 (West 1994).

adequately deter offenders. Many local governments have recently responded with new programs specifically targeted at johns in an attempt to combat these problems. These solutions differ from the traditional punishment of incarceration faced by prostitutes; this approach suggests that deterrence may not be achieved for prostitutes and johns in the same manner.

Since these programs are only applicable to men, it may seem that they themselves constitute discriminatory treatment and are no better than the current system. After all, why should women continue to face jail time while men are dealt with in ways that may be seen as less harsh? Arguably, viable alternatives to incarceration for prostitutes must be considered for full equality to take place.¹³⁰ These options have yet to be considered in any meaningful manner. But we can presently look at how male patrons are being treated as a starting point for developing new alternatives for women in the future.

A. CAR FORFEITURE

Car forfeiture is one measure that various governmental entities have tried as a deterrent for men participating in prostitution.¹³¹ Under such laws, men arrested in their cars while engaging the services of a prostitute automatically have their cars impounded.¹³² Some laws require the return of cars after offenders pay high fines.¹³³ Others have gone a step further

130. This Note does not attempt to meaningfully address the alternatives available to traditional incarceration for female prostitutes. Jailing prostitutes is not an effective deterrent since many prostitutes return to the streets after their release. See Kandel, *supra* note 3, at 329–30, 332. Incarceration may even cause prostitutes to depend more on turning tricks for a living since some prostitutes have “legitimate” jobs that are lost while in prison. See *id.* Furthermore, retribution does nothing to solve the core issues that cause many to enter into prostitution, such as drug addiction. See *id.* Some of the solutions used to combat patronization such as car forfeiture and publication are not as applicable to prostitutes as they are to patrons. However, other options such as “prostitution schools” would be a possible alternative. In addition, programs which address common problems of prostitutes such as poverty and drug addiction need to be implemented.

131. These measures have largely been inspired by federal forfeiture laws implemented in drug cases. See Stuart Wasserman, *Police Seize Johns’ Cars in Hooker Case/Portland, Ore., and Detroit Model Controversial Laws After Federal Drug Legislation*, S.F. CHRON., July 2, 1991, at A6.

132. Some states enacted such laws. See, e.g., CONN. GEN. STAT. § 53a-83a (West Supp. 1997). However, most forfeiture laws are implemented at the local level. See Yumi L. Wilson, *Oakland to Begin Seizing Johns’ Cars/New State Prostitution Law will Focus on Men who Pay for Sex*, S.F. CHRON., Dec. 27, 1993, at A1; Wasserman, *supra* note 131, at A6; Anthony Cardinale, *Prostitutes’ Clients Take an Impounding in Vice Crackdown*, BUFFALO NEWS, Jan. 25, 1994, at 1; Kevin Fagan, *Oakland to Seize Cars in Drug, Prostitution Cases*, S.F. CHRON., Sept. 22, 1997, at A15; Kevin Fagan, *Other DAs Watch Car Seizure Law/New Tactic Against Drugs in Oakland*, S.F. CHRON., September 23, 1997, at A16.

133. See Wilson, *supra* note 132, at A1 (California state law allows cities to adopt laws authorizing temporary seizure of cars upon conviction for soliciting prostitutes; cars are returned after towing, impounding and other fees are paid).

and allowed for the sale of impounded cars.¹³⁴

Some cities have reported that these penalties have been largely successful in curbing prostitution activities.¹³⁵ For example, the city of Buffalo instituted a law which resulted in many impoundings.¹³⁶ Buffalo's success prompted other cities such as Oakland, San Diego, Portland and Detroit to adopt similar programs.¹³⁷ Some of these laws have not achieved similar success because of restrictions in the ordinances themselves. For example, the Oakland law only allows for the seizure of a john's car once he has been convicted of solicitation of a prostitute within the past year.¹³⁸ Since many johns are not convicted, or are convicted of lesser offenses, the punishment will often be unavailable.¹³⁹

However, even when most successful, car forfeiture alone will not solve the problem. First, such laws obviously only apply to men arrested in their cars. Also, there may be a problem since cars are often registered in someone else's name, such as the john's wife.¹⁴⁰ Therefore, before enacting such a law, the government has to ensure that certain safeguards are taken to protect innocent car owners, and that other laws are in place to punish those not using their own cars.

In addition, these statutes have been vulnerable to constitutional attack.¹⁴¹ Some courts have considered the territory of forfeiture to be a state legislative prerogative, thus rendering local governments incapable of enacting such measures on their own. For example, in *Gonzales*, the court declared such an ordinance unconstitutional since the legislature had considered the question of forfeiture extensively and failed to proscribe it for prostitution offenses.¹⁴² Therefore, state law preempted a local government from doing so.¹⁴³ The court feared that leaving the decision in local hands could lead to a proliferation of inconsistent forfeiture

134. *See id.*

135. *See Baldwin, supra note 91, at 75.*

136. *See Cardinale, supra note 132, at 1* (fifty-eight impoundings were reported in an eight month period, but it is still too early to tell whether this will have overall effect of lowering instances of prostitution. However, impounding may at least make many men consider the effects of their actions).

137. *See Wilson, supra note 132, at A1; Wasserman, supra note 131, at A6.*

138. *See Wilson, supra note 132, at A1.*

139. *See id.* In fact, 95% of johns arrested in 1992 and 1993 in Oakland pled guilty to the lesser crime of disturbing the peace, which means that the forfeiture laws would not apply to them upon subsequent convictions. *See id.*

140. *See Cardinale, supra note 132, at 1. See also Wasserman, supra note 131, at A6.* Many agencies are also concerned that they might be punishing innocent persons by depriving all family members of the use of their only automobile. *See id.* California does not allow the seizure of cars if the vehicle is the only means of transportation for the family of the accused. *See id.* This limits the law's applicability and effectiveness.

141. *See State v. Gonzales, 483 N.W. 2d 736 (Minn. 1992).*

142. *See id.*

143. *See id.*

ordinances for petty misdemeanor offenses.¹⁴⁴ It was afraid that this would lead to inequity and confusion as different rules would apply from city to city.¹⁴⁵ Thus, it appears that until state legislatures decide to act, these measures will not be put into place.

Questions have arisen concerning the constitutionality of seizing the cars of johns before they have been convicted of a crime.¹⁴⁶ If lawmakers do not put safeguards in place to protect the rights of innocent individuals who have their cars seized, then many of these laws may be vulnerable to constitutional attack on due process grounds.¹⁴⁷ Therefore, property rights of johns must be protected. Cities such as Oakland, where local government has enacted these ordinances, have dealt with this problem by providing an opportunity for an immediate civil hearing regarding forfeitures.¹⁴⁸

Some states have refused to enact such measures, claiming that the penalty would be too harsh.¹⁴⁹ This smacks of another attempt to shield johns from the consequences for their actions. Forfeiture is certainly not harsher than the incarceration that prostitutes are forced to bear. It is a measure that is likely to work on a certain segment of johns who highly value their cars.

B. REVOCATION OF DRIVER'S LICENSES

A related proposal allows police to revoke driver's licenses of men caught patronizing prostitutes. A variation of this solution is already in place in Minnesota. A statute in that state provides that a notation will be placed on the license of a convicted patron of a prostitute who uses a vehicle in committing the offense.¹⁵⁰ But a mere notation is not nearly as severe as the punishment incurred by a prostitute. A proposed amendment to this statute would mandate the revocation of the patron's license for up to ninety days for the first offense and up to one year for each subsequent offense.¹⁵¹ Some states have already implemented such plans.¹⁵²

144. *See id.* at 738.

145. *See id.*

146. *See* Wasserman, *supra* note 131, at A6.

147. *See* Fagan, *supra* note 132, at A15.

148. *See* Fagan, *supra* note 132, at A15. *See also id.*, at A16. In Oakland it is possible for a suspected john to be found innocent of prostitution-related charges and yet still have his car sold. *See id.* This is the case because of the different burdens of proof in the criminal prostitution case and in the civil hearing regarding impoundment. *See id.* The cases are treated separately and the outcome of one does not effect the outcome of the other. *See id.*

149. *See* Baldwin, *supra* note 91, at 75-76.

150. *See* Giobbe & Gibel, *supra* note 3, at 23.

151. *See* MINN. STAT. § 609.324 (West 1994).

152. *See, e.g.,* FLA. STAT. ANN. § 322.26 (West 1995) (which already provides for revocation of driver's license upon conviction of a prostitution offense where a car has been used in perpetrating the crime); CAL. PENAL CODE § 647 (West Supp. 1998) (allowing suspension of driver's license for up to thirty days for conviction of disorderly conduct using a vehicle within 1,000 feet of a private residence).

Again, this is only a partial solution to the problem. Certainly this would be an effective deterrent since most men rely on having their cars for many important activities such as transportation to and from work. But even the amendment to the current Minnesota statute would only target those johns who use cars while committing the offense.¹⁵³ State legislatures should consider enacting statutes which mandate the revocation of driver's licenses for all convicted johns, whether or not they use a car while engaging the services of a prostitute. This would provide police with another weapon in their arsenal to deter all johns from committing these offenses. Of course, some johns may not have driver's licenses so this is only one option. There must be other punishments available to deter johns who do not possess driver's licenses.

Admittedly, license revocation for johns not arrested in their cars may not be constitutional since a state can generally only revoke a driver's license for public safety reasons or if the vehicle is used in a criminal offense.¹⁵⁴ However, having a driver's license is a privilege rather than a right.¹⁵⁵ If prostitutes can be forced to give up their entire freedom by being incarcerated for their offense, it is more than fair that johns in turn be forced to give up a mere privilege as a consequence of their crimes.

C. PUBLICATION OF NAMES IN VARIOUS MEDIA

Another interesting measure taken against johns is the publication of their names through the use of various media.¹⁵⁶ These programs are largely based on theories of deterrence which assume that patrons of prostitutes have a certain status within their communities which they do not want to jeopardize by a published criminal conviction of a sex-related offense.¹⁵⁷ This helps to explain why lawmakers do not aim such programs at prostitutes, since they are unlikely to have as much to lose as their male counterparts.¹⁵⁸

Publication of names is not a new idea. It has been around for over fifty years.¹⁵⁹ In 1932, in New York, the Magdalen Society exposed the names of johns to society.¹⁶⁰ Additionally, in the 1970s, the city of New York tried to equalize the treatment of prostitutes and johns by not only targeting johns in undercover operations but also by publicizing their names.¹⁶¹ Unfortunately, this program was heavily opposed and New York

153. See MINN. STAT. § 609.324 (West 1994).

154. See Giobbe & Gibel, *supra* note 3, at 23.

155. See, e.g., *Anderson v. Commissioner of Highways*, 267 Minn. 308 (1964).

156. See Persons, *supra* note 65, at 1526.

157. See *id.* at 1542.

158. See *id.*

159. See ROSEN, *supra* note 5, at 7.

160. See *id.*

161. See William E. Nelson, *Criminality and Sexual Morality in New York, 1920-1980*, 5 YALE J.L. & HUMAN. 265, 334 (1993).

law enforcement bowed to pressure to return "to a norm in which prostitutes were ten times more likely than their customers to be arrested."¹⁶²

Today, this idea is being employed at various levels of government. For example, the Pennsylvania legislature added a provision to its criminal code which would publish the names of a person convicted more than once of patronizing a prostitute.¹⁶³ Many communities have implemented other plans at the local level, including publishing names in newspapers, on billboards, on television and even sending letters to homes to inform family members of the crime.¹⁶⁴ For example, La Mesa, California instituted a program whereby photographs of convicted johns would be published in local newspapers.¹⁶⁵ The city council passed the ordinance over objections that it would violate the civil liberties of johns and would constitute an overreaching of the government's authority.¹⁶⁶

Nonetheless, the problem with these ordinances is that many johns are not actually convicted. If the police do not arrest johns and prosecutors do not prosecute, then these methods are not available. As discussed earlier, johns still rarely see the inside of a courtroom. To account for this problem, the La Mesa council considered plans to publish the photos of all johns arrested.¹⁶⁷ While this would not solve the problem of disproportionate arrest rates, this would at least stigmatize more johns than if conviction were a requirement. But La Mesa correctly dismissed the consideration on due process grounds, recognizing that it would be immensely damaging to publish the name of an innocent man.¹⁶⁸ The end result is that publication as a solution can only have minimal effectiveness, applicable only to a small portion of johns.

D. EDUCATIONAL PROGRAMS

Requiring convicted johns to attend "john schools" is another idea that a few cities have tested. San Francisco now allows first-time offending johns to keep their records clean by attending a seminar and paying a fine.¹⁶⁹ Similar programs have been implemented in Kansas City¹⁷⁰ and

162. *Id.*

163. See 18 PA. STAT. ANN. § 5902(e) (West Supp. 1996); Persons, *supra* note 65, at 1536; Pennsylvania is the only state legislature to mandate this punishment).

164. See Persons, *supra* note 65, at 1537; *Police send Johns Scarlet Letter Those Who Solicit, Serve as Prostitutes Get Warning*, FLA. TODAY, Aug. 11, 1997, at B6.

165. See Chet Barfield, *Dear John: If You're Caught Your Photo Might be Published*, S.D. UNION-TRIBUNE, Nov. 5, 1994, at B2.

166. See Chet Barfield, *La Mesa Aims to Combat Prostitution with Focus on Johns*, S.D. UNION-TRIBUNE, Sept. 29, 1994, at B3. See also Pearl Stewart, *Oakland Loses Bid to Publicize Prostitution Names*, S.F. CHRON., Jan. 7, 1988, at A4 (pointing out that some newspapers are refusing to run such ads because of civil liberties issues).

167. See Barfield, *supra* note 165, at B3.

168. See *id.*

169. See John Lyons, *S.F. Class Teaches Prostitute Clients the Price of Vice*,

Toronto, Canada.¹⁷¹ The idea is based on the same principles underlying traffic schools for those who violate the rules of the road.¹⁷²

The seminars generally have several components. First, prosecutors and police describe the legal risks that johns face by soliciting the services of prostitutes.¹⁷³ Residents of prostitution areas discuss the impact on their neighborhoods.¹⁷⁴ Johns are then shown graphic slides of genitalia ravaged by various sexually transmitted diseases.¹⁷⁵ And finally, former prostitutes talk candidly about their experiences with prostitution.¹⁷⁶ They attempt to expose johns to the realities faced by many streetwalkers by describing drug addiction, sexual abuse as children, rapes, assaults and other tragic aspects of the sex industry.¹⁷⁷

The number of men who reoffend is very low in cities with "john school" programs.¹⁷⁸ For example, in San Francisco the police only re-arrested four of the 1,300 men who went through this program for prostitution offenses.¹⁷⁹ This is significant considering that the normal recidivism rate for such crimes is approximately fifty percent.¹⁸⁰

San Francisco's success with its program for johns has prompted it to implement such classes for prostitutes as well.¹⁸¹ San Francisco now allows convicted prostitutes to choose between attending a week of rehabilitation classes or going to jail.¹⁸² These classes include discussions on sexually transmitted diseases, how the sex trade impacts surrounding communities and the legal consequences of prostitution.¹⁸³ After the class is over, there are other services available such as job counseling and programs for those who were victims of sexual abuse in childhood.¹⁸⁴

SACRAMENTO BEE, Oct. 9, 1997, at A4 (johns pay \$500 fine and attend a one day seminar).

170. See Gromer Jeffers Jr., *The Class No One Wants to Repeat, Those Arrested for Solicitation Sent to John School to Learn Lesson*, KANSAS CITY STAR, Aug. 31, 1997, at B1.

171. See Rebecca Bragg, *Penitent Johns See Other Side at "School", Information Blitz Leaves Many Shaken up Over Prostitution*, TORONTO STAR, March 23, 1997, at A6.

172. See Lyons, *supra* note 169, at A4.

173. See *id.*

174. See Lucy Johnston, *The Teachers are Prostitutes. The Pupils are Kerb Crawlers. Some School . . .*, THE OBSERVER, March 16, 1997, at 6.

175. See Lyons, *supra* note 169, at A4.

176. See *id.*

177. See Bragg, *supra* note 171, at A6.

178. See Lyons, *supra* note 169, at A4. See also Jeffers, *supra* note 170, at B1.

179. See *Program Gives Young Prostitutes Choice of Rehab or Jail; San Francisco Officials Hope Classes Help Hookers Quit Lifestyle*, SALT LAKE TRIBUNE, Sept. 19, 1997, at A19. These statistics measure the program's success from its inception in 1995 until September of 1997. Note that these statistics only count those johns that are arrested. It is impossible to know the true success of the program since johns who went through the program may be reoffending without getting caught.

180. See *id.*

181. See *id.*

182. See *id.* These classes are aimed at first time offenders and those who have short arrest records.

183. See *id.*

184. See *id.*

E. INSTITUTING CIVIL CAUSES OF ACTION FOR PROSTITUTES

At a seminar consisting of professors, prostitutes and students, a variety of proposals were offered on how to target all participants in prostitution, not just prostitutes.¹⁸⁵ One very innovative idea suggested that prostitutes should have a civil cause of action against their pimps for being coerced into prostitution.¹⁸⁶ To establish a claim, the plaintiff would show that the defendant coerced her into prostitution, used coercion to collect money derived from prostitution, or "hired, offered or agreed to hire the plaintiff to engage in prostitution knowing or having reason to know that the woman had been coerced by another person."¹⁸⁷ The proposal eliminated defenses such as compensation to the prostitute, prior dealings in prostitution before meeting the defendant and failure to make escape attempts by the plaintiff.¹⁸⁸ Remedies included compensatory and punitive damages as well as declaratory or injunctive relief.¹⁸⁹

The seminar participants wanted to broaden the application of such proposal to johns who knew of coercion by pimps or engaged in coercion themselves.¹⁹⁰ However, in 1994, when the bill was eventually passed into law by the Minnesota legislature, the bill defined "coercion" as using or threatening "to use any form of domination, restraint, or control for the purpose of causing an individual to engage in or remain in prostitution or to relinquish earnings derived from prostitution."¹⁹¹ This definition did not include money payments by johns.¹⁹² Proving coercion is a heavy burden to meet and mere inducement is insufficient to overcome it.¹⁹³

However, this law is an important option since it would not only allow compensation for injuries suffered by prostitutes, but also would have a deterrent effect by making it more costly for pimps to do business and for johns to become clients.¹⁹⁴ Unfortunately, the law does not seem to have much effect on johns since not only does coercion by another have to be present, but the john also has to know of this coercion. This seems very difficult to prove. Targeting pimps is definitely a step in the right direction and appears easier to demonstrate. So while this law is a good start, its

185. See Giobbe & Gibel, *supra* note 3, at 2, 13. This seminar took place in 1993 and was designed to provide guidance to the Minnesota legislature about the violence prevalent in the prostitution industry. See *id.* This included discussions of not only physical violence, but of the physical and psychological impact that prostitution has on women. See *id.*

186. See *id.* at 28.

187. *Id.* at 31.

188. See *id.* at 28, 50. The law as eventually passed did not totally eliminate such defenses, it only limited them. Testimony is now allowed with regard to such defenses but such testimony standing on its own cannot establish one of these defenses.

189. See *id.* at 30.

190. See *id.* at 30–31.

191. *Id.* at 41.

192. See *id.* at 38, 54–55.

193. See *id.*

194. See *id.* at 30.

effectiveness and applicability remain to be seen.

F. TARGETING DECEPTIVE ADVERTISING

This same seminar also proposed legislation which would target those who publish advertisements which disguise prostitution as legitimate escort services.¹⁹⁵ The goal is to punish the publishers and cut down on the advertising that these businesses rely on to stay operational.¹⁹⁶ The proposed bill allowed for both criminal penalties and civil remedies for those unwittingly seduced by such advertising.¹⁹⁷ Not only would the publisher be punished, but the victims of these services also have a viable remedy. While not specifically aimed at johns, this law could reduce the market available to johns by preventing escort services from seducing young women with promises of big money and lies about the sexual nature of the business.¹⁹⁸

CONCLUSION

Unfortunately, few care about prostitutes, the throw-away women. They exist on the fringes of our society, but not within it. We do not think twice about tossing them into jail cells. However, many of us claim a stake in upholding the status of the men who frequent these fallen women. They are our fathers, our husbands, our friends. They make and influence the law. Perhaps this explains why no one cries foul at the differential treatment these two groups receive for what is essentially the same crime. But for the sake of equality and fairness, we must not perpetuate the historical stereotypes of the wayward prostitute and the innocent john.

Equality under the law is an important start, but an incomplete answer. If there is no equality in enforcement it does not matter that laws are gender-neutral. Equality in enforcement can be realized if police departments must use the same number of male and female police officers in prostitution decoy operations. In addition, in cases where decoys are not used, judges should dismiss charges against prostitutes when the police fail to arrest the john. Furthermore, courts need to lower the burden for defendants trying to challenge prostitution laws by accepting as sufficient both testimony indicating a police departmental policy to not arrest johns and convincing statistical evidence of unequal enforcement.

As for the various measures aimed specifically at johns, no single legal recourse will solve the problem. The fact that communities are trying to shine the spotlight on johns is laudable, but we must not think that publishing johns' names or impounding their cars will level the playing field. They might act as effective deterrents in certain limited situations

195. *See id.* at 24.

196. *See id.*

197. *See id.* at 25.

198. *See id.* at 24.

once the johns enter the system, but until police actively target them these programs can have only minimal effects. If we are to overcome more than a century of discriminatory practices, we must put an end to the vast abuse of discretion employed by law enforcement. If not, johns will continue to thrive in society's shadows, shielded by a prejudicial legal system.